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[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 17, 2010]

No. 10-5087

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOHAMEDOU SALAHI,

Petitioner-Appellee,

v.

BARACK H. OBAMA, *et al.*,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

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GLOSSARY

Authorization for Use of Military Force ,
Pub. L. No. 107-40, 115 Stat. 224 (2001) . . . . . AUMF

Combatant Status Review Tribunal . . . . . CSRT

Intelligence Information Report . . . . . IIR

Joint Appendix . . . . . JA

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INTRODUCTION AND SUMMARY OF ARGUMENT

In our opening brief, we discussed the district court's findings that Salahi swore loyalty to al-Qaida and then continued to provide support to al-Qaida and associate with known al-Qaida terrorists (JA 254, 280). We argued that given the lack of any finding of disassociation from the group, as a matter of law, Salahi is properly deemed "part of" al-Qaida.

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In response, Salahi argues (pp. 32-33) that his oath to al-Qaida "is benign" because the al-Qaida he joined was "different from the al-Qaeda that attacked the United States in 2001." He asks this Court ignore his oath and then examine each subsequent act of support, recruitment, and association standing alone, without any relationship to his decision to join al-Qaida. The district court committed legal error in analyzing Salahi's status in such a manner. Salahi's swearing of *bayat* is essential to this case and the lens through which all his later activities must be viewed.

I. As we explained in our opening brief, because Salahi admittedly became part of al-Qaida by swearing loyalty to it, he should have the burden to show that he broke from the group. Salahi's argument that he should not have to bear the burden is based on the flawed premise that his loyalty oath is immaterial. But Salahi himself testified – and the district court found that – having sworn *bayat*, Salahi could not leave the group as late as 2001 without making himself its enemy. Swearing loyalty to al-Qaida therefore represented a significant and enduring commitment to the organization. Given the nature of al-Qaida and these enduring ties, Salahi bore the burden of establishing that he rescinded his oath. Because he failed to do so, he is properly detained as "part of" al-Qaida.

Whether or not he bore the burden of proving disassociation, the district court's findings and other evidence establish as a matter of law that he remained part of al-

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Qaida. Salahi continued to recruit and provide support for al-Qaida, and to closely associate with al-Qaida operatives, as al-Qaida turned its terrorist aims against, declared war on, and attacked the United States. In conjunction with his loyalty oath, these activities are sufficient to establish that he remained part of al-Qaida as a matter of law.

In response, Salahi claims there must be proof he was carrying out specific orders, but this Court recently rejected such a requirement. Salahi also claims that the facts failed to demonstrate his continued support for and affiliation with al-Qaida. This is, of course, not what the district court found. The court, while ruling against the government, found that Salahi continued to provide support to al-Qaida, and to associate with al-Qaida operatives and leaders.

II. Even if the judgment below is not reversed outright, this Court must remand with directions to consider wether to credit many inculpatory statements made by Salahi that the district court did not evaluate.

III. Salahi's remaining legal arguments have no merit. This Court has rejected the argument that a person who is part of enemy forces must personally commit a hostile act to be detainable. Further, there is no merit to the claim that a person who is "part of" al-Qaida may not be detained if he was handed over to the United States outside of Afghanistan. Finally, there is a ready analogy in the

traditional laws of war to a person, like Salahi, who has sworn *bayat*: an enlistee in the armed forces.

ARGUMENT

I. SALAHI DID NOT DISASSOCIATE FROM AL-QAIDA, AND REMAINED "PART OF" THE GROUP AS A MATTER OF LAW.

There are two overarching legal issues. First, whether Salahi had the burden to show that he had disassociated from al-Qaida given that he formally joined the group by swearing *bayat*. And second, whether, even if the burden remained on the government, Salahi's activities – as found by the district court – established as a matter of law that he remained part of al-Qaida.

Salahi argues (p. 35) that in assessing these issues, the district court's conclusion that Salahi was not "part of" al-Qaida can be reviewed only for clear error. That argument has recently been rejected by this Court. Instead, "whether a detainee's alleged conduct * * * justifies his detention under the AUMF is a legal question." *Barhoumi v. Obama*, — F.3d —, 2010 WL 2553540, at *6 (D.C. Cir. 2010); *see Awad v. Obama*, — F.3d —, 2010 WL 2292400, at *9 (D.C. Cir. 2010).

A. The District Court Erred in Not Requiring Salahi to Show He Had Disassociated from Al-Qaida.

In its opening brief, the government demonstrated that, by swearing *bayat*, Salahi became "part of" al-Qaida, and thus bore the burden of demonstrating that he

disassociated from the organization prior to his capture. Such a burden-shifting framework is proper here, and is fully consistent with the laws of war and analogous law.

As the district court found, Salahi never "prove[d] affirmative acts of disassociation"; never "'rejected al-Qaida"; and never "acted affirmatively to sever his ties" before his capture, JA 258 n.7. Instead, the district court found that Salahi remained an "al-Qaida sympathizer" and continued to "provide[] some support to al-Qaida," JA 254, 280, actions inconsistent with disassociation. Thus, Salahi failed to meet his burden of proving disassociation and is therefore "part of" al-Qaida and detainable under the AUMF. Salahi offers several contentions in response, none of which have merit.

1. Salahi argues principally (pp. 32-33) that his oath to al-Qaida "is benign" because the al-Qaida he joined in 1991 was "different from the al-Qaeda that attacked the United States in 2001." This argument is flawed at multiple levels. As an initial matter, under traditional law-of-war concepts, a member of an armed force of one nation can be detained by enemy forces of another nation during hostilities regardless of whether the two nations were at war when the individual joined his nation's forces. No German soldier captured by U.S. forces in 1943, for example, could have claimed unlawful detention on the theory that, at the time he joined the

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German army in 1936, his country was not at war with the United States. So too here, if one joined al-Qaida when it was not actively engaged against the United States, the United States is completely justified in treating that person as part of al-Qaida once hostilities begin.

Indeed, this Court in *Bihani v. Obama* rejected a similar argument that a force associated with al-Qaida should be given "notice of a conflict" and be "allowed the opportunity to remain neutral." 590 F.3d 866, 873 (D.C. Cir. 2010). If there is no such requirement for a force associated with al-Qaida, *a fortiori* there is no requirement for someone who had joined and swore enduring loyalty to al-Qaida itself.

2. Salahi further contends (p. 39) that *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), does not support the government's argument because there, burden-shifting was not suggested "*before* the government established that he met the criteria for detention." But *Hamdi*'s approval of burden-shifting as an evidentiary model provides an apt analogy – one that is particularly appropriate because swearing *bayat* definitively establishes that one is "part of" al-Qaida, giving the United States reason to presume that the individual will be true to that oath, and is thus a part of the enemy's forces, absent evidence to the contrary. *See id.* at 534 (burden-shifting allows detainee "a chance to prove military error while giving due regard to the

Executive once it has put forth meaningful support for its conclusion that the detainee is . . . an enemy combatant").

Importantly, Salahi does not contend that burden-shifting would violate the laws of war. Nor does Salahi's amicus, in spite of addressing the laws of war in detail. Non-Governmental Amicus, 8-23. In fact, some obligation on the part of Salahi to show his disassociation is envisioned by those principles in a conflict of this nature. At the heart of the laws of war is the "principle . . . of distinction" whereby "military forces are obligated to . . . distinguish themselves from the civilian population so as not to place the civilian population at undue risk." Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 U. CHI. J. INT'L L. 493, 514 (2003). Al-Qaida operates in blatant violation of this principle: it does not wear uniforms, and instead conceals its members as civilians who operate covertly to pursue its terrorist aims. *See Bihani*, 590 F.3d at 882 (Brown, J., concurring) (al-Qaida "adopt[s] long-term strategies and asymmetric tactics that exploit the rules of open societies without respect or reciprocity"). Requiring some showing of disassociation by a sworn member of al-Qaida is therefore essential and honors the larger purpose of the principle of distinction: protecting civilians.

Further, as explained in the opening brief, burden-shifting is consistent with the analogous law governing illegal conspiracies. Opening Br. 24. Salahi argues

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that this analogy is inapt because a "plurality of the Supreme Court . . . rejected the . . . argument that . . . conspiracy is a war crime." Br. 39 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 601-03 (2006) (opinion by Stevens, J.)). But the portion of the opinion Salahi cites is irrelevant to the issue here: Salahi is not being punished for *conspiring* with al-Qaida in the past; he is being held because he *joined* al-Qaida – became "part of" the group – and never disassociated from it.

Salahi also argues that the Court should not import the type of affirmative showing that must be made in a conspiracy case. Br. 40. Conspiracy law would require the person to "communicat[e] . . . the abandonment . . . to . . . co-conspirators." *United States v. Mardian*, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976). We agree that Salahi might satisfy his burden without this type of showing. Indeed, as we pointed out (Opening Br. 31), the passage of a significant period of time without al-Qaida activity could help establish disassociation, whereas in a conspiracy case merely ceasing to participate is insufficient. The point, however, is that, because it is appropriate to shift a burden when imposing criminal punishment, it is certainly proper to require a sworn member of the enemy force to show that he has left the group that has become our enemy in war.

In short, the district court committed legal error by failing to require Salahi to establish that he disassociated from al-Qaida. Because the district court's factual

findings indisputably establish that Salahi did not discharge – and could not have discharged – this burden, its judgment should be reversed, and Salahi's writ should be denied.

B. The Government Demonstrated That Salahi Remained Part of Al-Qaida as it Turned Against, Declared War On, and Attacked the United States.

Even if the government bore the burden of proving that Salahi remain part of al-Qaida after joining the group, it satisfied this burden. In contending otherwise, Salahi ignores the significance of his loyalty oath and his ongoing support, recruiting, and associations that continued even as al-Qaida turned against, declared war on, and began attacking the United States.

1. First, Salahi himself testified about the significant and enduring nature of his oath of loyalty to al-Qaida. He testified that once one joins, al-Qaida works "[j]ust like the Mafia," JA 2622 (Tr. 509). The expectation of loyalty was not transient; it is permanent. *See* Springer, ISLAMIC RADICALISM AND GLOBAL JIHAD 111 (Georgetown Univ. 2009) ("For al-Qa'ida, the bay'ah is central in cementing the group's command and control basis and structure."). Salahi explained that if he broke his loyalty oath, al-Qaida would "presume that I'm going to provide information about . . . how they operate, and then that would be very bad" (JA 2622 (Tr. 509)) because they "would hunt me down." JA 346 (CSRT). The district court

accordingly concluded that if he was perceived as violating that oath – even in 2001 – he would "mak[e] himself an enemy." JA 279.

Contrary to this finding of an enduring obligation to al-Qaida, Salahi now contends (p. 34) that *bayat* was for fighting the communists "and for no other purpose." But Salahi himself said that *"bayat* is not for a specific event, but for everything, or for an overall cause." JA 505 (IIR 12/4/03). This was true in the early 1990s, just as it was in 2001. *See* Atwan, THE SECRET HISTORY OF AL QAEDA 77 (U.Cal. 2006) (discussing swearing *bayat* "[i]n the early days" by al-Qaida's "inner circle"). Indeed, the notion that Salahi swore *bayat* solely to fight against the communists in Afghanistan is belied by the fact that, as Salahi explained at trial, immediately "[a]fter I swore *bayat*, I went to the travel agencies and prepared for my leave and . . . . I went back to Germany." JA 2587 (Tr. 371-72). His oath was therefore to remain a loyal member of al-Qaida *once he had returned to the West.*

2. In addition to the enduring nature of the oath of loyalty, the undisputed facts demonstrate that *Salahi's loyalty endured*: he maintained his al-Qaida affiliation; recruited others to join al-Qaida and provided support to the group; and associated with and helped its operatives as the organization focused its terrorist efforts against the United States.

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In 1991 Salahi joined al-Qaida and in the spring of 1992 Salahi was "fight[ing] . . . as a member of . . . al-Qaida" in Afghanistan. JA 263. Salahi contends that the district court made a factual finding that the al-Qaida he joined and fought for "was very different from the al-Qaida that turned against the United States in the latter part of the 1990s." JA 258 n.7. The cited statement, however, does not purport to be a factual finding, and is accompanied by no support in the record. As we detail below, it is well documented that al-Qaida's "turn[] against the United States" came well before the late 1990s. In fact, al-Qaida virulently opposed the United States even when Salahi first joined in 1991. *See* 9/11 REPORT 57 (Saudi Arabia's decision to "allow U.S. armed forces to be based in the Kingdom" following Iraq's invasion of Kuwait in 1990 shifted bin Laden's focus towards the United States); Wright, THE LOOMING TOWER 151-58 (Knopf 2006).

After joining, Salahi was fighting for al-Qaida in early 1992 and it was likewise "[i]n early 1992, [when] the al Qaeda leadership issued a fatwa calling for jihad against the Western 'occupation' of Islamic lands" and "[s]pecifically singling out U.S. forces for attack." 9/11 REPORT 59.[1] After this fatwa, Salahi in late 1992

[1] *See also id.* at 48 (describing "series of public and private calls since 1992 that singled out the United States for attack"); Atwan, at 22 ("'[bin Laden] was ready to strike the US'" in 1992); Alexander, USAMA BIN LADEN'S AL-QAIDA 39 (Transnational 2001) (in "1992," "al-Qaida declares that the U.S. military . . . should be attacked" and carries out an attack in Yemen in December 1992); *United States v. Bin Laden*, No. 98-1023, Indictment at 15-16, dkt. 380 (S.D.N.Y. Dec. 20, 2000) ("in (continued...)

"attempt[ed] to travel to Bosnia . . . to join the jihad." JA 263 & n.11. He then "visit[ed] an al-Qaida safehouse in Mauritania" with al-Qaida leader Hafs. JA 278.

Around 1994, when Salahi concedes bin Laden "'began to concentrate on . . . carry[ing] out operations against US . . . targets'" (Br. 33 (quoting Atwan at 48)), Salahi was in the midst of a multi-year period where he [redacted]

Indeed, Salahi understood and told a military tribunal that by the "mid-90's, [al-Qaida] wanted to wage Jihad against America, " JA 341 (CSRT).

It was also during this period – after Salahi acknowledges that al-Qaida had turned its sights on U.S. targets – that he assisted al-Qaida leader al-Iraqi in his travels through Germany to obtain telecommunications equipment. JA 271; JA 2632 (Tr. 550). Moreover, al-Iraqi's focus was clearly on the United States: he had "forg[ed] such powerful bonds [with bin Laden] that no one could get between them"; served as "his imam"; "head[ed] . . . al-Qaeda's fatwa committee"; and "[i]t was on [al-Iraqi's] authority that al-Qaeda turned from being the anti-communist Islamic army . . . into a terrorist organization bent on attacking the United States." Wright at 170-71; *see* Bin Laden Indictment at 16. And al-Iraqi was eventually, as

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[1](...continued)
or about 1992 until . . . 1993, . . . Usama bin Laden . . . disseminated fatwahs . . . that the United States forces . . . should be attacked") ("Bin Laden Indictment").

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we have explained, indicted for taking part in a direct attack on the United States – the 1998 U.S. embassy bombings – by, among other things, "travel[ing] . . . on behalf of al Qaeda . . . [to] Germany" and "purchasing communications and electronics equipment." Bin Laden Indictment at 12; *see also* 9/11 REPORT 57 (al-Iraqi, a "founding member [of al-Qaida] . . . used his position as head of a Bin Ladin investment company to carry out procurement trips [in] Western Europe").

After al-Qaida issued a "[d]eclaration of jihad against Americans" in August 1996,[2] Salahi continued to act in accord with his oath of loyalty to the organization. [redacted] in the example established by the Chris Paul facsimile sent in 1997, the "refer[ral" was to known al-Qaida member Paul, who was operating *in the United States*. JA 268-69. He also moved the money for Hafs into Mauritania during this period. JA 275.

And after al-Qaida had in "1998 . . . undertake[n] a major terrorist operation" by "bombing[] . . . the U.S. embassies in" Africa, Salahi Br. 33, killing over 220

[2] Alexander at 41; *see* 9/11 REPORT 48 (in "August 1996, Bin Ladin . . . issued his own self-styled fatwa calling on Muslims to drive American soldiers out of Saudi Arabia" and "celebrat[ing] recent suicide bombings of American military facilities"); *see also* Alexander, App. 1.A, p. 16, 19, 21 (bin Laden's fatwa) (reminding those "who fought in Afghanistan and Bosnia . . . that the battle had not finished yet"; "[y]our brothers . . . are calling upon your help and asking you to take part in fighting against the enemy . . . the Americans"; "[t]hose youths know that their rewards in fighting you, the USA . . . . to enter paradise by killing you").

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people including 12 Americans, Salahi, in late 1999, "provided lodging . . . at his home in Germany" for future 9/11 conspirator al-Shibh and steered him toward al-Qaida for jihad training in Afghanistan. JA 268. Salahi stated at a military tribunal that, by this time, "[i]n the late 90's it was clear that al Qaida trained people as potential soldiers against the U.S." JA 341. Salahi was steering those "potential soldiers against the U.S." towards training in Afghanistan with al-Qaida.

And after those al-Qaida attacks sharply focused U.S. attention on the threat posed by al-Qaida, Salahi moved to Montreal and managed to immediately "f[i]nd and live[] among . . . al-Qaida cell members" who were operating covertly, JA 280; he discussed the details of an al-Qaida telecommunications project with Ganczarski, JA 271-72; and he received the fraudulent passports from Hafs which would allow him to escape to Afghanistan unlawfully, if necessary. *Id.*

Finally, in 2000 and 2001, as al-Qaida was bombing the USS COLE and planning 9/11 (and Salahi was unable to leave Mauritania), Salahi maintained his "ongoing and relatively close relationship" with al-Qaida leader Hafs, JA 275; he began setting up a jihadi web site, but halted work "because Ganczarski discouraged the plan," JA 274; he was involved in "planning . . . denial of service computer attacks," JA 274; and, in June 2001, he gave the passport to a stranger introduced to him by a "Libyan al-Qaida member." JA 279.

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In sum, Salahi continued to fulfill his oath of loyalty to al-Qaida after its aims – attacking the United States – were perfectly apparent. JA 254, 280. Here, where Salahi swore an enduring oath of loyalty to the organization, did not disassociate from that terrorist group, and continued to fulfill his oath through acts of support and recruitment and by closely associating with al-Qaida members, the district court erred as a matter of law in holding that he was no longer a "part of" al-Qaida.

C. Salahi Cannot Insulate His Activities from Al-Qaida.

Salahi next argues (pp. 1-18, 35-37) that the facts were not sufficient to demonstrate his continued support for and affiliation with al-Qaida. This is, of course, not what the district court found. JA 280. Indeed, the district court's findings show that there was no break between Salahi and al-Qaida and that Salahi's argument is without merit.

1. Salahi first argues (p. 14, 33) that the district court properly disregarded evidence of his recruiting and other support activities because the government failed to offer proof of an al-Qaida order to Salahi directing him to engage in specific tasks. *See* JA 269 (Order) (no evidence " Salahi was tasked with an order to recruit al-Qaida members"); JA 278 (visiting al-Qaida safehouse and moving passports not "shown to have happened within the command structure of al-Qaida").

This Court has now specifically rejected the argument that "there must be a specific factual finding that [petitioner] was part of the 'command structure' of al

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Qaeda" because "there are [other] ways . . . to prove that a detainee is 'part of' al Qaeda." *Awad*, 2010 WL 2292400, at *10. One such way, as we explained in our opening brief (pp. 21-22), is the swearing of *bayat* to al-Qaida. *See Awad*, 2010 WL 2292400, at *10 (command structure showing is "immaterial to the government's authority to detain" where individuals "identified themselves as being members of al Qaeda"). By providing "support" to al-Qaida, Salahi was simply fulfilling his previous oath, and no proof of specific commands is necessary. The oath shows definitively that Salahi was "sufficiently involved with the organization" and not a "purely independent . . . freelancer." *Bensayah v. Obama*, No. 08-5537, slip op. at 12 (D.C. Cir. June 28, 2010). The district court therefore erred as a matter of law in concluding that the government "had to show that the support Salahi undoubtedly did provide from time to time was provided within al-Qaida's command structure." JA 280.

2. Salahi next contends that his various activities were not sufficiently connected to al-Qaida. In each case, he is mistaken, even under the district court's narrow reading of the evidence.

a. Recruiting. The district court accepted as correct [redacted] and the court found that Salahi was involved in this regard with known al-Qaida member Paul and eventual 9/11 planner Shibh. JA 264-69.

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i. Salahi first latches on to the district court statement that Salahi was not a "recruiter." Br. 13 (quoting JA 269). But what is important here is not the rhetorical characterization but the actual facts. [redacted] This was not only quintessential recruiting, it also occurred frequently, and the district court accepted this statement as accurate. JA 269.

The facsimile to Paul and the lodging of Shibh establish specific instances of this recruiting, and Salahi cannot distance himself from this role by using innocuous-sounding nomenclature for these activities.

Thus, what is critical is that, based on Salahi's facsimile to al-Qaida member Paul, the court held that Salahi "was willing to refer would-be jihadists to" al-Qaida "when the opportunity arose." JA 269. Stating that Salahi was "refer[ing]" jihadists to al-Qaida, rather than "recruiting" for al-Qaida, JA 269, does not change the operative factual finding: he continued to fulfill his oath to al-Qaida in part by directing would-be jihadists to become al-Qaida fighters. The most natural way to describe Salahi's role, in a word, is the word the district court declined to use: "recruiter." *See* WEBSTER'S 3D NEW INT'L DICTIONARY at 1899 (1993) (recruit means "to strengthen or supply (as . . . a military organization) with . . . additional

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members"). But whatever term one might use for this activity, the facts belie Salahi's disassociation claim.

Similarly, Salahi points out (p. 14) that at trial, he "says he did *not* recruit al-Shibh." But the district court found that Salahi provided Shibh "lodging . . . in Germany . . . and that there was discussion of jihad and Afghanistan." JA 268. The latter finding – that there was "discussion of jihad and Afghanistan" – is critical, given that the only evidence before the Court regarding a "discussion of jihad and Afghanistan" was evidence that Salahi encouraged Shibh and his companions to travel to Afghanistan to receive jihad training. *See* JA 265 (the "statements by . . . [redacted] Karim Mehdi," "if credited, would establish that Salahi . . . encouraged them to travel to Afghanistan for training" and "gave them instructions for traveling to Afghanistan").[3] Salahi himself agreed at trial that he "probably fed al-Shibh with the information I knew about [going] safely in[to] Chechnya" to fight, which meant traveling first to Afghanistan for training. JA 2611, 2629 (Tr. 465, 539); *see* JA 718. Salahi is therefore incorrect in urging that he was not recruiting

[3] The district court elsewhere asserted that Mehdi's statements "indicate only that Salahi knew bin al-Shibh and Jarrah were going to Afghanistan for training, not that Salahi encouraged them to do so." JA 267 (citing JA 702). This description of the record evidence is simply wrong. In fact, Mehdi quite explicitly stated: "[w]e talked about the best way to conduct a jihad and *we told them that prior to going into combat there had to be a minimum training and for that they had to go to Afghanistan.*" JA 718 (emphasis added).

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and this evidence, even under the district court's narrow reading, shows that Salahi was engaged in an ongoing pattern of recruiting.

ii. Salahi is also mistaken in arguing (Br. 14) that these recruiting activities were not related to al-Qaida or in fulfillment of his oath to al-Qaida. The recruiting with Paul, as the district court found, was directly related to al-Qaida. Paul was, after all, a person Salahi "knew to be al-Qaida" and to whom Salahi steered would-be jihadists "when the opportunity arose." JA 269.

As Salahi points out (p. 14), the district court dismissed [redacted] But in addition to being infected by the error of requiring a specific al-Qaida order, *id.*, this conclusion is incorrect: [redacted] which directly ties this recruiting to al-Qaida. Salahi had just returned from training and fighting with al-Qaida in Afghanistan. It was in Afghanistan that al-Qaida was operating training camps. JA 323. And it was in Afghanistan where Salahi later advised Shibh to go for training (JA 268), and where he then went, trained with al-Qaida, and became a "core member[] of the 9/11 plot . . . [with] remarkable" speed. 9/11 REPORT 166. As Salahi told an interrogator, when he was fighting for al-Qaida in Afghanistan in 1992, "U[sama bin Laden] . . . came to the safe house . . . and held a speech" where he explained that "Af[ghanistan] would always be a place for training." JA 1041 (SIR 4/25/05). The

necessary inference is that, by referring would-be jihadis to Paul, and by steering Shibh and the other recruits to Afghanistan, Salahi was recruiting for al-Qaida.

b. Work for Hafs. Salahi argues (p. 9) that the district court did not find that Salahi performed work for al-Qaida leader Hafs, "on matters related to al-Qaeda." In fact, the district court's findings establish that he performed work for Hafs, and this activity led in part to the court's finding that Salahi "provided some support to al-Qaida." JA 254.

First, the court found that Salahi "hosted . . . [al-Qaida leader] al-Iraqi in Germany in 1995 and 1996 and [al-Iraqi] spoke to him about the telecommunications equipment he . . . planned to purchase for Sudan." JA 271; *see* JA 2632 (Tr. 552) (Salahi "assisted him" by discussing bids and the equipment being purchased, among other things). Salahi argues (p. 9) that this was not "work[] for his cousin," but at trial he admitted it was Hafs who "called [Salahi]" and "asked me . . . if I [was] willing to work with [al-Iraqi]," thus leading Salahi to provide this "assist[ance]." JA 2609, 2632 (Tr. 459, 552). In short, Salahi was continuing to perform work for al-Qaida.

Similarly, Salahi received and held a fraudulent passport provided to him by Hafs, delivered by a known al-Qaida operative, Ganczarski, and eventually passed on in the summer of 2001 to a stranger – the purported owner – introduced to Salahi by a "Libyan al-Qaida member." JA 279; JA 2637 (Tr. 570). Salahi's receipt,

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possession, and eventual delivery of a passport at the behest of al-Qaida members operating under the direction of Hafs constitutes further evidence of his continued membership in al-Qaida. *See Bensayah*, slip op. at 16 (distinguishing "travel[] under fraudulent documents" for personal reasons from using "fraudulent travel documents . . . for al Qaeda"). Indeed, this activity led the district court to conclude that it "raise[d] unanswered questions." JA 273. Salahi's other activities with Hafs – such as moving substantial sums of money into Mauritania and visiting a safehouse Salahi admitted was "related to al-Qaeda" – also raised such questions. JA 2623 (Tr. 514-15); JA 278.

The bottom line is that these activities performed for Hafs were evidence of Salahi's continuing work in fulfillment of his enduring oath of loyalty to al-Qaida. While concluding they occurred, the district court described these activities as being "something like . . . *a non-al-Qaida member* providing housing to his al-Qaida member son." JA 275 (emphasis added). Salahi, however, was not a "non-al-Qaida member"; the undisputed fact is that Salahi was already a *sworn al-Qaida member*. Thus, in performing tasks for an al-Qaida leader – even one who is his cousin – Salahi fulfilled his oath to serve the organization, not his family. Indeed, that is exactly how Salahi treated his cousin – like an al-Qaida boss, not a family member. JA 346 (CSRT) (if he told Hafs to "forget me . . . they would hunt me down").

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c. Other al-Qaida related activities. As we explained in our opening brief, Salahi also engaged in other activities and associations that closely tied him to al-Qaida. As the district court found, Salahi "lived among or with al-Qaida cell members in Montreal" (JA 280) and there was evidence that "might well be enough to support a criminal charge of providing material support to al-Qaida," by, among other things, helping Mohsen in his effort to travel to Chechnya to fight. JA 277. And Salahi acknowledges, as the district court found, that there was a "link between" him and would-be millennium bomber Ahmed Ressam. Br.17. This is not the sort of activity that would be expected of one who had reneged on an oath of loyalty to al-Qaida.

Salahi also engaged in computer work with al-Qaida operative Ganczarski. He halted work on a jihadi web forum based on Ganczarski's concerns about "surveillance." JA 2639 (Tr. 577); *see* JA 274. Ganczarski also trusted Salahi enough to discuss telecommunications equipment he was purchasing for al-Qaida fighters. JA 271-72; JA 2634 (Tr. 557).

In his response brief, Salahi now argues (p. 8) that the government did not "prove Salahi's involvement in those projects," But as the district court found, Salahi "admitted to attempting to start [the] web forum" and "was aware of the equipment Ganczarski had purchased" for the telecommunications project. JA 271-72, 274. As we explained in our opening brief (p.49), such knowledge of an al-

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Qaida project is itself powerful evidence that he was trusted by al-Qaida and had a continuing role in al-Qaida.

Moreover, with regard to these activities, Salahi relies [1,2] [redacted] (Br. 17, 44 (citing JA 1861-63)), in which Salahi denied specifically planning to harm the United States. But in that same interview Salahi *admitted* having performed computer and telecommunications work for al-Qaida. JA 1862. He explained that "he did not participate in any plans [to harm the United States] *while he was an Al Qaida member* because *he had a specific job to set up computers and connect with the internet and set up wireless communications.*" *Id.* (emphasis added). Thus, in this interview on which Salahi relies extensively (Br. 17, 44), he explicitly admitted that he was a "member" of al-Qaida at this time and was performing "a specific job" – telecommunications and computer work – *for al-Qaida.*

Finally, the district court found that Salahi maintained close associations with al-Qaida operatives and al-Qaida leader Hafs. Salahi claims (p. 11) that his contact with Hafs was "sporadic," but the district court found "an ongoing and relatively close relationship with Abu Hafs" that included "telephone and email contact right up to 2001," JA 275, 278. Salahi had significant relationships with two al-Qaida operatives, Mehdi and Ganczarski, who were planning – and later were convicted for their involvement in – terrorist bombing plots. JA 279. The court found that

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Salahi also had relationships with five other al-Qaida members, JA 279, including al-Iraqi, a "founding member [of al-Qaida]" (9/11 REPORT 57), two "important figures in al-Qaida's Montreal cell," JA 279, al-Libi, the man who helped retrieve the fraudulent passport, and Paul, the United States-based al-Qaida operative who "pled guilty . . . to conspiracy to use a weapon of mass destruction." JA 279. All told, as the district court recognized, Salahi "associated with at least a half-dozen known al-Qaida members and terrorists." JA 280. Salahi did not, as he now claims, merely associate with these individuals as friends in "ordinary discourse" (Br. 8), but he had gained an expansive knowledge of al-Qaida methods and operations from these associations. *See, e.g.*, JA 271 (Salahi "was aware of the equipment" for al-Qaida); JA 929, 946. These associations help show, as we explained in our opening brief, that Salahi did not disassociate from the group; but rather remained a loyal and trusted al-Qaida member.

II. ALTERNATIVELY, A REMAND TO PROPERLY CONSIDER SALAHI'S INCULPATORY STATEMENTS IS REQUIRED.

Salahi's detention is lawful based on the district court's findings and Salahi's trial testimony alone. But as we pointed out in our opening brief (Br. 52-53), the district court erred in failing to consider the numerous additional inculpatory statements made by Salahi. Many of those were made after Salahi's CSRT statement, which the court credited because it was made "about a year after his

coercive interrogation and after he had disavowed earlier incriminating statements." JA 263-64. The district court, however, performed no similar analysis of nearly 70 other statements. Nor did it evaluate the credibility of Salahi's testimony that all such incriminatory statements were fabrications. This was error, and requires remand.

Salahi does not argue that the decision may be affirmed if it lacks an assessment of those statements. Br. 43-44. Instead, he contends that the district court in fact evaluated such statements and held that "Salahi's uncorroborated statements . . . are not reliable." Br. 44 (citing JA 267-68). In fact, the district court made no such finding, and the cited pages of the court's opinion do not address the reliability of Salahi's uncorroborated statements.

For example, at one of the cited pages (JA 268), the district court refused to consider Salahi's 2005 statements to FBI agents that were corroborated by the Paul facsimile, dismissing them not based on lack of corroboration, but as "filigree" that "is unnecessary." JA 268-69. To avoid evaluating whether to credit these statements, the district court dismissed them as immaterial. But the statements were highly material. In them, Salahi admitted, among other things, that faxing Paul "was something we did to facilitate getting brothers to fight, to get them moving." JA 877. It therefore helped show that Salahi regularly engaged in recruiting, as we

explained in our opening brief (p. 55). Because it was relevant, the district court erred in failing to determine whether it should be credited.

Thus, Salahi is simply wrong in contending that the district court adopted a rule whereby it would only rely on Salahi's statements if they were corroborated. Moreover, as we just explained, the court treated Salahi's CSRT statement as reliable (JA 263-64) without any assessment of whether it was corroborated, further demonstrating that the district court applied no such consistent approach.

In any event, such a prophylactic corroboration rule would have been erroneous. First, it would fail to take account of other factors that are relevant in evaluating the incriminating statements, such as the "passage of time and intervening events" from prior alleged mistreatment or willingness to "disavow[] earlier incriminating statements." JA 260, 263-64. The district court noted these factors, but did not apply them.

Second, a rule of disregarding all uncorroborated statements would have been particularly inappropriate given that Salahi testified in court. His testimony should have enabled the court to evaluate the credibility of his trial recantations, as we explained in our opening brief (Br. 53), such as his discredited testimony that he "had never seen the [Paul] fax." JA 268.

Salahi to the district court's hearing statement that it was "inclined to reject anything" not "corroborated" (Br. 43). But he fails to mention was considering this

as "a . . . safe haven." JA 2655 (Tr. 644). If the court was applying a "safe haven" of rejecting Salahi's inculpatory statements while still ordering his release, this would be an obvious error.

Salahi's remaining argument on this point is to contend that all statements he made prior to the habeas trial were unreliable because of his treatment. Br. 44. But because the district court made no findings on this issue, a remand is needed. On remand, the district court may consider the various factors in evaluating whether to credit those earlier inculpatory statements.[4]

III. SALAHI'S DETENTION AS "PART OF" AL-QAIDA IS AUTHORIZED IRRESPECTIVE OF WHETHER HE PERSONALLY PARTICIPATED IN HOSTILITIES OR WAS TRANSFERRED TO U.S. CUSTODY OUTSIDE AFGHANISTAN.

Salahi argues (pp. 48. 52) that his detention is not authorized because he was transferred to U.S. custody "far from any battlefield" and "never participated in hostilities against the U.S." Salahi contends that an interpretation of the AUMF to allow the detention of such a person would violate the Constitution. These arguments have no merit.

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[4] Amicus NACDL argues (p. 24) that all statements made after Salahi's claimed mistreatment must be suppressed as "fruit of the poisonous tree." This argument was rejected by the district court, JA 259-60, and Salahi does not contend that the district court erred; it is therefore waived. On the merits, the argument fails even in criminal cases. *See Oregon v. Elstad*, 470 U.S. 298, 311-12 (1985). *A fortiori*, no such rule would be appropriate here.

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A. First, there is no requirement that Salahi have personally engaged in combat, as this Court held in *Bihani* and reaffirmed in *Barhoumi*. In *Bihani*, the court rejected Bihani's argument that he "must commit a direct hostile act, such as firing a weapon in combat, before [he] can be lawfully detained." *Bihani*, 590 F. 3d at 871; *see Barhoumi*, 2010 WL 2553540, at *15. Thus, this argument is meritless.

B. It is also of no moment that Salahi may have been transferred to U.S. custody in a location other than Afghanistan. The President's detention authority under the AUMF is not limited to persons captured on a "battlefield" in Afghanistan, but speaks to the "organizations" that perpetrated the 9/11 attacks, which includes al-Qaida. *Bensayah*, slip op. 11. Thus, this Court recently rejected similar arguments, in the case of a man "turned over to the United States" in Bosnia, acknowledging al-Qaida's "global reach" and explaining that "the AUMF authorizes the Executive to detain, at the least, any individual who is . . . part of al Qaeda." *Id.* at 3, 11-12. This holding reflects the fact that limiting the government's authority to detain persons who are part of al-Qaida only to persons captured in Afghanistan would "contradict Congress's clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary." *Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), *rev'd on other gnds*, *Boumediene v. Bush*, 128 S. Ct. 2229; *see also Ex Parte Quirin*,

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317 U.S. 1, 37-38 (1942) (upholding military detention of German combatants apprehended outside of European theater).

Salahi's cramped interpretation of the AUMF would "cripple" the President's "capability to effectively combat" al-Qaida. *Gherebi v. Obama*, 609 F. Supp.2d 43, 66 (D.D.C. 2009). As amicus observes, al-Qaida is a "transnational organization," Non-Government Amicus Br. 12, and Salahi himself testified that immediately "[a]fter I swore *bayat* . . . . I went back to Germany." JA 2587 (Tr. 371-72). In this context, nothing in the AUMF or in the laws of war suggests that the United States cannot detain someone who is a part of enemy forces who is transferred to our custody by a foreign sovereign in a location other than Afghanistan.

C. One amicus argues that, to be deemed "part of" al-Qaida, there must be an "analog[y] . . . to a member of the military in a traditional armed conflict." Non-Governmental Amicus Br. 5. But as we explained in our opening brief, swearing *bayat* to al-Qaida definitively establishes that one is "part of" the enemy subject to detention. Opening Br. 21-22. The proper analogy is to a person who has enlisted in the military force of a state. The sort of tasks an enlisted member of the military performs need not be further assessed, as formal membership definitively shows he is "part of" the group, and detainable under the laws of war and the AUMF. Further, since there is no non-militant wing of al-Qaida, every member of al-Qaida is detainable as part of enemy forces. *Bensayah*, slip op. at 11. Of course here, after

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swearing *bayat*, Salahi in fact *fought* in Afghanistan for al-Qaida, showing that he was not only a member of al-Qaida, he had the capacity to serve al-Qaida in armed combat.

While a further assessment of Salahi's role need not be conducted, the types of actions taken by Salahi after swearing *bayat* show him to have performed the types of functions a member of a traditional military would perform. Of course, his fighting in Afghanistan and efforts to rejoin the fight in Bosnia show an obvious combat role analogous to that performed by soldiers in a traditional armed force. He also took part in al-Qaida recruiting, a traditional function of the uniformed military that is almost always conducted far from the theaters where recruits will later be sent. He also facilitated the travel of al-Qaida operatives in the West. *See* JA 271-272, 277, 2632. This corresponds to the roles played by members of state armed forces such as logistical officers, who facilitate the travel of the military. Salahi also was involved in al-Qaida-related communications work with al-Iraqi and Ganczarski. This type of assistance in communications between fighters is the type of function a member of a uniformed military would regularly perform. *See* Collins, MILITARY STRATEGY at 40 (Brassey's 2002).

As the 9/11 report recognized, all of these activities – recruiting, travel facilitation, and communications – are the types of activities that enable al-Qaida to operate in such a pernicious and dangerous manner. *See* 9/11 REPORT 172-73.

D. Finally, Salahi argues (pp. 55, 58) that the government's interpretation of the AUMF would violate his purported rights under the Due Process Clause not "to be detained without criminal trial." These arguments were not raised in district court and are waived. In any event, the detention of those who are "part of" al-Qaida has been expressly and repeatedly upheld by this Court. *Bihani*, 590 F.3d at 872; *Awad*, 2010 WL 2292400, at *9.

CONCLUSION

For the foregoing reasons, and the reasons in the government's opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced in Times New Roman 14-point type, and that it contains 6979 words according to a word count performed by Microsoft Word, excluding the portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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August E. Flentje

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2010, I filed and served the foregoing Reply Brief for Respondents-Appellants by delivering an original and seven copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer.

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